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2. PLEADING—*General issue—Special pleas.* Where the general issue has been pleaded, special pleas which set up matters of defence which can be proved under the general issue should be rejected.

3. BONDS—*Non est factum—Failure of obligor to sign—Injury.* The failure of one of the obligors in a bond to sign it in person, if it can be set up as a defence in any case by the other obligors, cannot be set up where it appears that judgment has been rendered against such obligor, and no one has been injured by his failure to sign and acknowledge the bond in proper person.

PAYNE'S EX'ORS V. HUFFMAN.—Decided at Wytheville, June 21, 1900. *Cardwell, J.* Absent, *Riely, J.*:

1. ASSIGNOR AND ASSIGNEE—*Diligence—Recourse—Case in judgment.* Due diligence must be used to charge either a guarantor or an assignor. The assignee being entitled to recover of the assignor on the grounds of failure of consideration, it will devolve on him to show (unless otherwise agreed) that he used due diligence to collect the debt of the debtor, but used it in vain. What is due diligence cannot be precisely defined, but immediate suit, followed by execution, is always due diligence, though this is not indispensable. In the case in judgment the assignee has not only failed to show due diligence or lack of injury to the assignor, but the evidence tends to show that if diligence had been used the debt could have been made out of the principal debtor, and therefore the assignee cannot recover of his assignor.

REPASS V. MOORE.—Decided at Wytheville, June 21, 1900.—*Keith, P.* Absent, *Riely, J.*:

1. SUBROGATION—*Taxes—Voluntary payment by treasurer.* A county treasurer who voluntarily pays the State and county taxes of a tax-payer in his hands for collection without any previous request or subsequent promise of indemnity, and with no assignment of the tax lien (if it be capable of assignment) is not entitled to be subrogated to the liens of the State and county for the taxes so paid. The doctrine of subrogation is not enforced in favor of mere volunteers.

WISE V. COMMONWEALTH.—Decided at Wytheville, June 21, 1900.—*Keith, P.* Absent, *Riely, J.*:

1. CRIMINAL LAW—*Trespass—Claim of right—Bona fides—Evidence—Verbal contract to convey land.* A defendant cannot be convicted of a trespass where the act complained of was done under a *bona fide* claim of right, and evidence of a verbal contract to convey to the defendant the land on which the alleged trespass was committed, though not admissible to show title, is admissible to show the *bona fides* of defendant's claim.

WARD V. REASOR.—Decided at Wytheville, June 28, 1900. *Cardwell, J.* Absent, *Riely, J.*:

1. PLEADING—*Malicious prosecution—Declaration—Finality of prosecution.* In an action for malicious prosecution it must be charged and proved, amongst other things, that the prosecution alleged in the declaration and conducted to its termi-

nation and that it ended in the final acquittal of the plaintiff. An allegation that an offence of which a justice of the peace had jurisdiction was dismissed by him "without the introduction of any testimony," or that the defendant, "without the introduction of any testimony," caused the plaintiff to be discharged and not prosecuted for said offence, is not such an averment of the final termination of the prosecution as will support an action for malicious prosecution. It amounts to no more than a *nolle prosequi*, which is no bar to a further prosecution for the same offence.

KELLY V. LEHIGH MINING AND MANUFACTURING CO.—Decided at Wytheville, June 28, 1900.—*Buchanan, J.* Absent, *Riely, J.*:

1. CHANCERY PRACTICE—*Delivery of title papers—Adequate remedy at law.* A court of equity has jurisdiction to decree the specific delivery of title papers to heirs at law, devisees and other persons properly entitled to the custody and possession of the same when they are wrongfully detained or withheld from them. This is an old and well-settled subject of equity jurisdiction, and is not affected by the fact that a statute gives the complainants a complete and adequate remedy by an action of detinue. In the absence of prohibitory or restrictive words in the statute, courts of equity still retain their jurisdiction in such cases.

2. MUNIMENTS OF TITLE—*Delivery—Common law rule—Rule in Virginia.* Although at common law a grantee of land was entitled to demand and have of his grantor all title deeds and muniments of title, and the same passed with the conveyance of the land without being mentioned in the deed, this common law rule is not in force in this State where the public records furnish evidence of title, and where copies therefrom, equally with the originals, are admissible in evidence, and hence the grantee is not entitled, as a matter of law, to demand of his grantor the original muniments of title.

3. CONTINUANCE—*Discretion.* A motion for a continuance is addressed to the sound judicial discretion of the trial court under all the circumstances of the particular case, and its action will not be reversed unless plainly erroneous.

MAX MEADOWS LAND AND IMPROVEMENT CO. V. MCGAVOCK AND OTHERS.—Decided at Wytheville, June 28, 1900.—*Buchanan, J.* Absent, *Riely and Harrison, JJ.*:

1. CHANCERY PLEADING AND PRACTICE—*Case in judgment—Lien on purchase price—How enforced—Irregular proceedings—Correct results.* Several joint owners of a tract of land sold and conveyed it to a purchaser, reserving a vendor's lien for balance of purchase money. Default having been made, they instituted suit for specific performance of the contract. At this stage of the proceedings two of the vendors assigned and transferred to a trustee all their right and interest in the unpaid purchase money for said land in trust to secure the payment of a debt, providing further in the deed that "if said contract is not specifically enforced by the court" then they "convey their interest in said land to the party of the second part." The contract was specifically enforced, the land sold in the suit brought for that purpose, and at such sale the original vendors became the purchasers. They paid no cash payment, but gave bonds without security for de-